No. 96-653

In the Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,
Petitioners,
vs.
GENERAL MOTORS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND NEW ENGLAND LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amici Curiae National Association of Manufacturers and New England Legal Foundation respectfully submit this brief in support of the Respondent, General Motors Corporation. All parties have consented to the filing of this brief.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers in the United States and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM

through its Associations Council and National Industrial Council. As manufacturers often involved in litigation in the several States, the NAM's membership has an abiding interest in the proper and consistent application of the Full Faith and Credit Clause in order to ensure that one State's judgments are accorded finality and respect by the courts of other States.

New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977. Its membership consists of corporations, individuals and others who support NELF's mission of promoting balanced economic growth, protecting the free enterprise system and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared before this Court, as party or counsel, in cases raising settlement and/or employment law issues. *See, e.g., Amchem Products v. Windsor*, 65 U.S.L.W. 4653 (June 25, 1997); *Lockheed Corp. v. Spink*, 116 S.Ct. 1783 (1996); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996). NELF's members and supporters are concerned with the sanctity of injunctions, especially those that are used to settle employment disputes, and with ensuring that they cannot be circumvented lightly by those with unrelated claims for relief. NELF believes that this brief will give the Court an additional perspective that may assist in determining the proper scope of the injunction here and whether the federal district court's refusal to honor the Michigan state court injunction was contrary to the Full Faith and Credit Act.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that the Full Faith and Credit Clause and its implementing statute require a federal court in Missouri to enforce the obligations created by a

permanent injunction issued by a Michigan state court with jurisdiction over the person that is the object of the injunction.

1. The Full Faith and Credit Clause and its implementing statute require that a permanent injunction of a Michigan court be given the same effect that the injunction would be given under Michigan law, including the rule of Michigan law that a judgment must be honored unless and until modified *by the issuing court*. The full faith and credit obligation applies to all "judicial Proceedings," and there is no exception to the obligation for injunctions or other equitable decrees. Nor may a state refuse to honor another state's judgment on the ground that it violates the "public policy" of the forum state. The purpose of the Full Faith and Credit Clause was to eliminate such conflicts between States by requiring them to honor one another's judgements. Recognizing such exceptions would allow one State to substitute its judgment for that of the rendering State, contrary to the clear command of Article IV, Section 1 and 28 U.S.C. § 1738 that "Full" faith and credit be given state court judgments.

2. Although Petitioners claim that honoring the injunction would violate their rights under the Due Process Clause, they can point to no life, liberty or property interest that is implicated in this case. The injunction does not bar Petitioners' cause of action nor does it "bind" them in any relevant sense. To the extent that Petitioners complain that enforcing the injunction against Elwell will affect adversely their ability to present evidence in their case, the appropriate remedy under Michigan law and as a matter of full faith and credit is for them to seek relief from the issuing court. This requirement does not violate the Due Process Clause.

ARGUMENT

I.

THE FEDERAL DISTRICT COURT MUST ACCORD FULL FAITH AND CREDIT TO THE MICHIGAN JUDGMENT

A. The Michigan Judgment Must Be Accorded The Same Effect That It Would Have Under Michigan Law, Which Provides That The Judgment Is Binding And Enforceable And Cannot Be Modified Except By The Issuing Court

1. The Effects Of A Judgment Under The Law Of The Rendering State Determine The Faith And Credit That Other Courts Must Give It

The Full Faith and Credit Clause was a critical component of the Constitution's plan to transform the States from independent sovereigns into a unified nation. The Clause was to be a nationally unifying force "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of state of its origin." *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-77 (1935).

The Clause provides that:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Art. IV, § 1.

The Clause differs from the predecessor provision in the Articles of Confederation, which did not contain any provision for determining the manner of proof and the effect of state judgments, thus presumably leaving those matters to the state courts themselves. *See* ARTICLES OF CONFEDERATION, Art. 4. By stating that the newly constituted national legislature could decide these matters, the Constitution ensured that the Full Faith and Credit Clause would receive uniform application among the States — a point that James Madison emphasized. *See* THE FEDERALIST No. 42 (Madison).

Shortly after ratification of the Constitution, Congress exercised its power under Article IV, § 1 to provide for the manner of proof and the effect of state court judgments by enacting a statute providing that the judgment of every state court shall be given "such faith and credit . . . in every court within the United States as they have by law or usage in the courts of the state" that rendered the judgment. Act of May 26, 1790, ch. 11, 1 Stat. 122. The current version of the statute provides that judgments must be given "the same full faith and credit" as they would receive in rendering State. 28 U.S.C. § 1738 (emphasis added).

This Court has articulated this principle as a bedrock of the Full Faith and Credit obligation. Thus, in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813), Justice Story stated for the Court that "we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision." Chief Justice Marshall reiterated this fundamental principle, stating "the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced . . ." *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818).

This Court's more recent precedents confirm that a state court judgment must be treated "with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec. Indus. Co. v. Epstein,* 116 S. Ct. 873, 877 (1996). *See also Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373 (1985). Generally speaking, this means that where the judgment would be binding and enforceable in the rendering State, it likewise should be binding and enforceable in another State. *Matsushita,* 116 S. Ct. at 877.

2. Under Michigan Law, The Injunction Is Binding Unless And Until It Is Vacated Or Modified By The Issuing Court

Under Michigan law, the judgment against Ronald Elwell is fully binding and enforceable — and is no less so because it takes the form of an injunction, or because the injunction was entered by consent, or because the issuing court retains the power to modify the injunction upon an appropriate showing. Most significantly, Michigan law permits modification only by the issuing court, even if sought by an adversely affected nonparty to the original action.

Michigan law accords binding and enforceable effect to a judgment so long as it is "final," and treats a judgment as "final" as soon as it is rendered, subject to a brief waiting period in case of monetary judgments. *McHugh v. Trinity Bldg. Co.*, 254 Mich. 202 (1931); Mich. Ct. R. § 2.614. The same rules (except for the waiting period) apply to injunctions, which are accorded full, binding and enforceable effect immediately upon entry. *Niles v. Lee*, 169 Mich. 474, 483 (1912); *City of Troy v. Hershberger,* 27 Mich. App. 123, 127-28 (1970). *See also* Mich. Ct. R. § 7.203(A)(1) (according "finality" to orders as well as judgments at law); *id* at § 2.614(A)(2)(c) (providing that injunctive relief may be included in a final judgment). Michigan law accords similar final, binding and enforceable effect to a judgment

entered into as a result of a settlement between the parties. *See In re Estate of Meredith*, 275 Mich. 278, 289 (1936); *Tudryck v. Mutch*, 320 Mich. 99, 104-05 (1948).

That a judgment, including an injunctive decree, may be modified at a later time by the issuing court does not affect its finality for purposes of appeal, res judicata, or enforcement. As under federal practice, see Fed. R. Civ. P. 60(b), Michigan law provides that all final judgments may be modified on grounds of mistake, newly discovered evidence, fraud, or inequitable prospective application, or on the ground that the judgment is void. Mich. Ct. R. § 2.612. Nonetheless, Michigan courts consistently enforce permanent injunctions and give them res judicata effect. *See First Protestant Reformed Church v. De Wolf*, 358 Mich. 489, 494-95 (1960); *Gruber v. Dodge*, 45 Mich. App. 33, 36 (1973); *City of Troy*, 27 Mich. App. at 125-27; Mich. Ct. R. § 2.703(A)(1) (possibility of modification does not affect the finality of a judgment or order).

With the exception of judgments that are void on account of fraud or lack of personal or subject matter jurisdiction, any judgment under Michigan law, including an injunction, may be modified or vacated only by the specific judge who issued it, so long as that judge is present and capable of acting. Mich. Ct. R. § 2.613; *Wilson v. Romeos*, 387 Mich. 664, 678 (1972). This rule applies to motions for modification under § 2.612 of the Michigan Rules of Court, *see Huber v. Frankenmuth Mutual Insurance Co.*, 160 Mich. App. 568, 574-76 (1987), as well as motions to set aside consent judgments, *see Berar Enterprises, Inc. v. Harmon*, 101 Mich. App. 216, 228 (1980). Thus, Michigan does not allow a collateral attack on an injunction in another Michigan court, unless the first court lacked subject matter jurisdiction. *Huber*, 160 Mich. App. at 574. Michigan's policy underlying this rule is to protect the integrity of the initial court's judgment, to avoid forum-shopping, and to

refer the motion to the judge presumptively most qualified to entertain it. *Id.; Liberty v. Michigan Bell Tel. Co.*, 152 Mich. App. 780, 783 (1986).

Under Michigan law, a third party adversely affected by an injunction may seek to modify it by filing a motion with the issuing court for intervention and then for modification, Mich. Ct. R. §§ 2.209, 2.612(C), 2.613(B), *D'Agostini v. City of Roseville*, 396 Mich. 185, 188 (1976) (persons who may be adversely affected though not "bound" by a suit may intervene as of right), and the issuing court has full discretion to grant the modification. *Sylvania Silica Co. v. Berlin Township*, 186 Mich. App. 73, 75 (1990). Modification may be granted if "it is no longer equitable that the judgment should have prospective application," Mich. Ct. R. § 2.612(C), or the court finds "any other reason justifying relief." *Id.* § 2.612(C). If the request is denied, that decision can be reviewed by Michigan appellate courts for abuse of discretion. *Michigan Bank-Midwest v. D.J. Reynaert, Inc.*, 165 Mich. App. 630, 642-43 (1988).

A request by a third party intervenor to modify a Michigan judgment, as with a request by a party, must be made to the judge that issued the order, so long as that judge is available. Mich. Ct. R. § 2.613(B). Indeed, on at least two occasions, persons not parties to the initial action between GM and Elwell tried to avoid enforcement of the injunction in actions before a different Michigan court. Respondent's Appendix D & E. In each of these cases, the Michigan judge hearing the second action rejected these requests, holding that the injunction would continue to be enforced unless and until the plaintiffs secured a modification by the issuing court. *Id.*

Thus, under Michigan law, an injunction otherwise binding on the parties is enforceable even it affects the interests of third parties. A third party who is adversely affected by an injunction and wishes to have it modified must make that

application as an intervenor to the issuing court. Michigan law provides a procedure through which such third party interests will be considered by the issuing judge — a process that is reviewable on appeal at the third party's request. The full faith and credit obligation requires a court in Missouri to honor the injunction to the same extent.

B. There Is No Exception To The Full Faith And Credit Clause Here That Would Authorize The Federal District Court To Refuse To Honor The Michigan Judgment

Given that the law of the issuing state determines the full faith and credit applicable to a judgment, and given that Michigan law makes the injunction here binding and enforceable against Elwell even if challenged by adversely affected third parties, other courts in the United States must give the order the same force and effect. There is no exception to the full faith and credit obligation that warrants a different result here.

1. There Is No Exception To The Full Faith And Credit Obligation For Injunctions Or Other Equitable Decrees

Petitioners suggest that the Full Faith and Credit Clause may not apply to the Michigan judgment because it is in the form of an injunction, implying that injunctions or equitable decrees somehow are not entitled to full faith and credit. Pet. Br. 25-28. There is no basis for this position in the text of the Full Faith and Credit Clause, the text of the implementing statute, the history of the Clause, or this Court's prior precedents — all of which compel the contrary conclusion that full faith and credit must be given to equitable decrees so long as they are binding and enforceable in the courts of the issuing State. As noted above, Michigan law gives full binding effect to injunctive decrees.

By its terms, the Full Faith and Credit Clause applies to all "judicial Proceedings," and does not distinguish between "equitable" and "legal" proceedings. This is highly significant, because other provisions of the Constitution make clear that when the Founders wished to draw such a distinction, they did so explicitly. Thus, the Seventh Amendment applies only to "suits at common law." Article III creates federal jurisdiction over "all Cases of admiralty and maritime Jurisdiction" without requiring a federal question or diversity of citizenship; over federal question "Cases, in Law and Equity"; and over diversity cases without distinction among law, equity, or admiralty. No textual distinctions between law and equity appear in the Full Faith and Credit Clause. Likewise, § 1738 does not distinguish between law and equity.

Nor is there support for Petitioners' argument in the history of the Full Faith and Credit Clause or in any background understanding about the nature of equity. To the contrary, in adopting the present version of the Clause, the Constitutional Convention left out proposed language that would have limited its operation to bankruptcy cases and protests based on foreign bills of exchange. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 447 (1911). Bankruptcy jurisdiction, of course, historically has been considered equitable. *See, e.g., Katchen v. Landy*, 382 U.S. 323, 327 (1966). That the Founders considered and rejected this limitation belies the notion that the Clause was not meant to apply to cases in equity.[1]

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[1] Indeed, one of the early uses of the term "faith and credit" in English practice was to express the rule in the common law courts of giving effect to judgments of the ecclesiastical courts of equity. *See, e.g., Grove v. Elliott*, 2 Ventr. 41, 86 Eng. Rep. 474, 476 (1606) ("[w]e must give faith and credit to their [the ecclesiastical courts] proceedings, and presume they are according to their law"). *See generally* Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 44-46 (1957)

Historically, equity decrees were considered binding in subsequent proceedings, as Blackstone explained in his Commentaries, and prevented relitigation of issues determined in equity. 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 452-55 (1768). He also explained that a right of appeal became necessary for equity decrees precisely because the equity courts' decrees were considered binding and often were used to resolve such issues as rights in real property. *Id.* at 454-55. Likewise, Justice Story commented that "a decree in equity is held of equal dignity and importance with a judgment at law." J. Story, COMMENTARIES ON EQUITY JURISPRUDENCE § 547 (1835).[2]

This Court's consistent precedents require full faith and credit for decrees that are in their nature equitable. *Matsushita Elec., supra* (class action in Delaware Chancery Court); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins Ass'n*, 455 U.S. 691 (1982) (state conservatorship of an insolvent company); *Barber v. Barber*, 62 U.S. (1 How.) 582, 591 (1859) (divorce and alimony awarded by New York Chancery Court).[3] This

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[2] Justice Story discussed full faith and credit in his COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1297-1307 (1833), and recognition of judgments in his COMMENTARIES ON THE CONFLICT OF LAWS §§ 584-600 (1834): neither discussion contains the slightest hint of an equity exception.

[3] *Fall v. Eastin*, 215 U.S. 1 (1909) is consistent with this point. It held that neither a Washington decree nor a deed executed by the Washington court was effective of its own force to transfer title to land in Nebraska. The Full Faith and Credit Clause "does not extend the jurisdiction of the courts of one state to property situated in another, *but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit.*" *Id.* at 12 (emphasis added). Thus, the Court held that a plaintiff relying on the Washington decree must first sue on the decree and reduce it to a Nebraska decree, just as a plaintiff relying on a Washington damage judgment must get a Nebraska judgment prior to execution in Nebraska. It was the plaintiff's claim for

Court never has indicated that such decrees are subject to different treatment under either the Full Faith and Credit Clause or the corresponding statute.

Finally, all of the policies underlying the Full Faith and Credit Clause are fully applicable to equity decrees. The "risk of relitigation," which "inheres in our federal system," *Underwriters Nat'l Assurance Co.*, 455 U.S. at 704, is equally strong with injunctive decrees, and state courts have incentives just as strong to refuse enforcement of such orders. As noted above, the Clause was intended "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation . . ." *Milwaukee County*, 296 U.S. at 276-77. Nothing in the nature of injunctive relief or in the nature of equity decrees would lend such decrees to an exception to this policy.

Petitioners erroneously suggest that *Donovan v. City of Dallas*, 377 U.S. 408 (1964), supports an exception for injunctions or otherwise shows "an absence of a Full Faith and Credit obligation" in this case. Pet. Brief at 27. In *Donovan*, this Court held that the Supremacy Clause forbade the state courts of Texas from enjoining litigants from invoking the jurisdiction of federal courts granted by an act of Congress. The Court did not hold that a federal court may refuse full faith and credit to a state court judgment where the only effect of enforcing the judgment would be to make a particular piece of evidence unavailable in the federal proceeding. In fact, with respect to the underlying judgment of the Texas court that the City's bond issue was legal, the Court expressly stated that

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"greater efficacy" for equity that the Court rejected. *Id.* 12-14. *See also id.* at 15 (Holmes, J., concurring) (equity decrees entitled to full faith and credit).

> [i]t may be that a full hearing in an appropriate court would justify a finding that the state-court judgment in favor of Dallas in the first suit barred the issues raised in the second suit, *a question as to which we express no opinion.*

377 U.S. at 412 (emphasis added). Thus, had the state court not issued a supplemental order enjoining the litigants from proceeding in federal court, the federal court would have had to give effect to the underlying judgment to the full extent that Texas law required. If Texas law required that the "first suit" be given preclusive effect, the "second suit" in federal court would have been "restrain[ed]" to the limited determination that the first judgment was *res judicata*. That is the effect on federal court proceedings in every case requiring the application of the full faith and credit obligation.

It also is significant that law and equity have been merged in the federal courts and in most States. In a merged system, legal and equitable claims may be joined in the same case, and the principal distinction between them lies in the remedy sought. *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). An equity exception would produce absurd results in a merged system. First, a judgment ruling on both legal and equitable claims would be binding only as to the legal claims. But full faith and credit should apply to a judgment as a whole, not to selected parts of a judgment, depending upon whether they are "legal" or "equitable" in nature. *Cf. Evans v. Jeff D.*, 475 U.S. 717 (1986) (holding that plaintiff class could not retain the benefits of a settlement while rejecting other provisions that benefited defendants). Second, injunctive relief presupposes that a litigant has no adequate remedy at law. Restatement (Second) of Torts § 936 (1977). Thus, if equity decrees are not given full faith and credit, a litigant would face a choice between an inadequate remedy that would be final and

binding in all States and an adequate remedy that would be subject to collateral attack in every other State.

2. There Is No "Public Policy" Exception That Justifies A Refusal To Honor The Michigan Injunction

This Court long has held that there is no public policy exception to the obligation to give full faith and credit to the judgment of a State. *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Morris v. Jones*, 329 U.S. 545, 553 (1947); *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990). Although the Court has held that a State is not required to apply an inconsistent *legislative* enactment of another State, *see Griffin v. McCoach*, 313 U.S. 498, 507 (1941), this Court has emphatically rejected the proposition that a *judgment* of another State can be ignored on ground that it is offensive to the policies of the forum State. *Howlett v. Rose*, 496 U.S. at 382 n.26 ("The full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment rendered in another state, *although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy*.") (emphasis added).

A public policy exception would be inconsistent with the core concept of full faith and credit. "The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ . . . If full faith and credit is not given in that situation, the Clause and the statute fail where their need is the greatest." *Morris v. Jones*, 329 U.S. at 553. The Full Faith and Credit Clause is part of the structural commitment in the Constitution to the equality of the States, *see, e.g.*, U.S. CONST., Art I, § 3, cl. 1 (equal number of senators); Art. IV, § 2, cl. 1 (Privileges and Immunities Clause), and guarantees the equal authority for each State's judgments. As Justice Jackson stated, "the policy ultimately to be served in application of the clause is the federal policy of a 'more perfect union' of our legal systems. No local interest and no balance of local interests

can rise above this consideration." Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 27 (1945).

Moreover, the constitutional requirement is "Full Faith and Credit" — not some credit, partial credit, reasonable credit, credit in cases where States do not disagree over public policy, or credit where the second State would have reached the same result anyway. Indeed, the Constitutional Convention considered the less demanding formulation that "full faith and credit *ought to be given*" to sister States' judgments, but the permissive term "ought" was stricken upon the suggestion of James Madison and replaced by the mandatory language of "shall." 2 FARRAND, *supra*, at 489. Congress reinforced this point in the implementing legislation: it requires other courts to give to Michigan judgments "the *same* full faith and credit" that Michigan would give to its own judgments.

Even weaker is the argument that federal courts may declare a Michigan judgment offensive to federal policy. Such an exception would be an especially unwarranted intrusion into matters of state policy. *Cf. Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938) ("[t]here is no federal general common law"). Indeed, if an exception based on federal policy existed, one would expect to find it in cases involving important federal questions — especially questions arising under the civil rights laws, where the original grant of federal jurisdiction has been said to have reflected mistrust of the state courts, *see Mitchum v. Foster*, 407 U.S. 225, 241-42 (1972), or under statutes protecting unique federal interests by granting exclusive jurisdiction to federal courts. But this Court repeatedly has rejected such an exception and held litigants bound by state court determinations, or state agency determinations reviewed by state courts, in such contexts. *See Migra v. Warren City School Dist. Board of Education*, 465 U.S. 75 (1984) (§ 1983); *Kremer v.*

Chemical Construction Corp., 456 U.S. 461 (1982) (Civil Rights Act of 1964); *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980) (§ 1983); *Matsushita Elec., supra* (securities law); *Marrese, supra* (antitrust).

Although each of these federal statutes embodies important federal public policies, none was held to limit the operation of § 1738, which compels federal courts to give the same effect to judgments as would the rendering State. It would be quite incongruous to hold that § 1738 is implicitly overridden by the public policy interests that the Federal Rules of Evidence are asserted to embody, especially when those Rules leave privilege issues in diversity cases such as this one to state law.

If a second court could refuse to honor another state's judgment on "public policy" grounds, few judgments would be safe from relitigation.[4] Resourceful counsel could revive every argument that the parties made in the first case, advance those arguments in the second case, and cast the first court's rejection of those arguments as a rejection of the second State's "public policy" — a result that would not be consistent with the unifying policies underlying the Full Faith and Credit Clause.

Indeed, this case illustrates how "public policy" can be invoked to relitigate the factual determinations of the court that rendered the first judgment. There is no significant disagreement in the substantive legal principles or policies applied by the Michigan court and then later by the federal district court. The law of both jurisdictions recognizes the need for broad discovery and the protection of privileged

[4] Giving full faith and credit to *judgments* — as opposed to *statutes* — without regard to "public policies" also furthers the purpose of enhancing judicial economy by preventing relitigation of claims. A public policy exception in the choice of law context does not frustrate these goals.

information. The courts' only disagreement was whether, as a factual matter, Elwell's knowledge is so permeated with privileged sources that he cannot tell when he is violating GM's privileges and when he is not. The contrary conclusions reached of the federal district and the Michigan court do not involve a fundamental issue of policy.[5]

Similarly, Michigan courts do not question the policy that rights of third parties should be considered in fashioning injunctive relief. *See Hayes-Albion v. Kuberski*, 421 Mich. 170, 189-90 & n.11 (1984). Thus, Petitioners' position essentially would require this Court to assume that the Michigan court violated its duty to give due weight to the interests of third parties as required by Michigan law. Because most if not all States require courts in considering injunctive relief — including such relief granted by way of a consent decree — to consider the effect the injunction would have on the public interest or on third parties, *see* Restatement (Second) of Torts §§ 933, 936, 942 (1977), enforcing the full faith and credit obligation to honor the injunction here will not, as Petitioners suggest, cause an avalanche of collusive decrees designed to bury the unfavorable testimony of witnesses.[6]

[5] Although Petitioners identify a federal policy in favor of "the right to every man's evidence," Michigan recognizes the same policy, so that it cannot plausibly support a "public policy" disagreement between two jurisdictions. *See People v. Stanaway*, 446 Mich. 643, 662-663 (1994) ("the public has a right to everyone's evidence"). Similarly, just as Michigan recognizes the doctrines of attorney-client privilege and attorney work product, this Court has recognized that important policy interests promoted by these doctrines place a limitation on discovery. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947).

[6] Petitioners' suggestion that consent decrees somehow should be entitled to less full faith and credit would undermine the policy favoring settlements. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 10-11 (1985); Fed.

In sum, this Court has correctly rejected the notion of a "public policy" exception to Full Faith and Credit for judgments, which is contrary to the constitutional mandate that a judgment that is conclusive under the laws of the rendering state must be conclusive in every other court.

3. The Full Faith And Credit Clause And Statute Require The Federal Court To Honor The Michigan Rule That Any Motion To Modify The Michigan Judgment Must Be Presented To In The Issuing Court

As discussed above, Michigan law provides that an injunction is enforceable even if it adversely affects (but does not directly "bind") nonparties, unless and until they secure modifications from the issuing court. Apart from their due process challenge, which is treated below, *see* Part II *infra*, Petitioners offer no reason why a court determining the full faith and credit owed the injunction should disregard this one particular effect under Michigan law among all others.

There is no such basis in the statute itself. It provides: "[E]very other court in the United States" is to give the injunction the "same full faith and credit" it has "by law or usage" in Michigan. 28 U.S.C. § 1738 As Justice Story declared, "when Congress gave the effect of a record to the judgment it gave all the collateral consequences." *Mills*, 11 U.S. (7 Cranch) at 484.

Moreover, the rule that an injunction is enforced unless and until an adversely affected nonparty seeks relief in the issuing court would not be a good candidate for an exception to full faith and credit. Courts of Appeals consistently have held that, where a federal court has issued a protective order limiting access to materials discovered in one case, other litigants seeking access to those materials should present

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R. Civ. P. 68. If a party were not assured that a settlement would be enforceable, then that party would be far less likely to settle.

their claims to the issuing court. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988) (" 'the procedurally correct course' for third party challenges to protective orders" is by intervening in the case in the issuing court); *United States v. GAF*, 596 F.2d 10, 16 (2d Cir. 1979); *Grove Fresh Distributers, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896-97 (7th Cir. 1994); *Empire Blue Cross & Blue Shield v. Janet Greeson's*, 62 F.3d 1217, 1219-20 (9th Cir. 1995); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

Because federal courts apply such a rule as a matter of comity, they necessarily must do so when determining the effect of a state court judgment, which is governed not by comity but by the far stronger full faith and credit obligation. *Cf.* 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 178 (1833) (Full Faith and Credit Clause intended more than the credit "which, by the comity of nations, is ordinarily conceded to all foreign judgments." Rather, it was intended to "give them a more conclusive efficiency, approaching to, if not identical with, that of domestic judgments.").

This Court's decision in *Ex parte Uppercu*, 239 U.S. 435 (1915), on which Petitioners rely, endorses exactly the approach as that required under Michigan law. In that case, as here, third parties affected by an order limiting disclosure of evidence sought relief from that order. This Court made clear that the proper course in such a circumstance is to seek relief from the issuing court. As Justice Holmes explained, "the orderly course is to obtain a remission of that command [sealing the evidence] *from the source from which it came.*" *Id.* at 440 (emphasis added). A requirement that modifications of a judgment be sought only in the issuing court is a common one that long has been respected by other courts called upon to determine the effect they should give such a judgment. For example, the law gov-

erning the relations among nations has long held that the courts of one country could not modify the judgments of another, even if modification was an available remedy in the issuing nation. As one English court explained in *Cottington's Case* (1678), cited in *Kennedy v. Cassillis,* 2 Swans. 313, 326, 36 Eng. Rep. 635, 640 (1818), "it is against the law of nations not to give credit to the judgments and sentences of foreign countries, *till they be reversed by the law, and according to the form,* of those countries wherein they were given." (emphasis added).

Therefore, there is nothing in the Full Faith and Credit Clause or statute that requires a federal court to give the injunction less effect than it would have in Michigan, where adversely affected third parties could prevent enforcement of the injunction only by seeking relief from the issuing court. Nor is there anything in the Due Process Clause that compels this result, as explained in the following section.

II.
ACCORDING FULL FAITH AND CREDIT TO THE MICHIGAN JUDGMENT AGAINST ELWELL DOES NOT VIOLATE PETITIONERS' RIGHT TO DUE PROCESS

In an effort to avoid the mandate of the Full Faith and Credit Clause, Petitioners advance the principle that they cannot be "bound" by a judgment in a case where they were not parties or otherwise represented. Pet. Brief at 12. This proposition — while undoubtedly true in the sense that a court cannot issue an order foreclosing a nonparty's claim or ordering a nonparty to pay money on a judgment — has no application here, because the Michigan injunction does not "bind" Petitioners in this way, but rather only incidentally affects their ability to *obtain evidence* for claims that they are able to pursue. The only burden that would be imposed on Petitioners by giving full faith and credit to the Michigan

injunction is that Petitioners must either forego the use of Elwell as a witness; or attempt to obtain his testimony by seeking a modification of the injunction in the issuing court. As shown below, this burden on Petitioners' ability to seek evidence, imposed by the full faith and credit obligation, does not amount to a due process violation.

A. Petitioners Are Note "Bound" By The Michigan Judgment Within The Meaning Of This Court's Precedents

Petitioners cite cases holding that the invocation of claim or issue preclusion against a nonparty deprives the nonparty of a cause of action, which is a "species of property" interest, *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982), protected by the Due Process Clause. In each of these cases, nonparties to a judgment had been alleged to be "bound" by the judgment because the second court will not even consider their claim. *See Richards v. Jefferson County,* 116 S.Ct. 1761 (1996) (prior adjudication of constitutionality of county tax cannot bar subsequent challenges by nonparties); *Martin v. Wilks,* 490 U.S. 755 (1989) (consent decree cannot be used as defense to nonparties' claim that actions taken pursuant to the decree violates Title VII of the Civil Rights Act of 1964); *Hansberry v. Lee,* 311 U.S. 32 (1940) (no preclusive effect given to a finding in earlier suit which, if given effect, would foreclose a nonparty's defense); *Fall v. Eastin,* 215 U.S. 1 (1909) (divorce decree cannot preclude third party's claim of contractual entitlement to land).

The Michigan injunction here does "bind" Elwell and is enforceable against him as a matter of full faith and credit. But it does not similarly "bind" Petitioners, who remain free to litigate every element of their claims on the merits, including defect in design, causation in fact, proximate cause, etc.

What Petitioners have been denied — *unless and until* they obtain modification of the injunction in Michigan — is the opportunity to call a particular witness in their case. This incidental effect of the Michigan judgment does not deprive Petitioners of "the right to pursue a lawful claim of liability," despite their claim to that effect. Pet. Brief at 16. The question before this Court, therefore, is whether Petitioners have a protected property or liberty interest in Elwell's testimony, and if so, whether the procedures available to them, consistent with giving effect to the Michigan judgment, meet the minimum standards of due process.

B. A Litigant Has No Cognizable Due Process Interest In Particular Evidence

The Due Process Clause is implicated only where the government seeks to deprive a person of a protected interest in life, liberty, or property. *Board of Regents v. Roth,* 408 U.S. 564, 570 (1972). Petitioners' claimed right "to elicit and introduce relevant, nonprivileged testimony," Pet. Brief at 16, clearly is not a liberty interest guaranteed by the Constitution: although the Sixth Amendment guarantees certain rights to compulsory process of witnesses in *criminal* cases, the Seventh Amendment contains no comparable provision for civil cases in federal court.[7]

Nor do Petitioners have a protected property interest in Elwell's testimony. Applicable state law, which determines the existence of a property right, *see Roth,* 408 U.S. at 577, does not create any right that rises to the level of a property interest as defined by this Court. *Id.* Missouri courts have rejected the notion that evidentiary statutes create an enti-

[7] Petitioners have not argued that exclusion of Elwell's testimony imposes any stigma on them, *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), or restrains their freedom to engage in any activity "essential to the orderly pursuit of happiness by free men." *Roth,* 408 U.S. at 572 (citation omitted).

tlement to particular evidence. *See Martin v. Schmalz,* 713 S.W.2d 22, 23-24 (Mo. Ct. App. 1986) (holding that statutory change denying access to previously available evidence "does not affect any existing substantive right" and can be applied retroactively despite the prohibition on enactment of any law "retrospective in its operation," 1945 Missouri Const. Art. 1, § 13); *see also State ex rel. Faith Hospital v. Enright,* 706 S.W.2d 852, 854 (Mo. 1986) (rules of evidence do not create substantive rights).

Indeed, Missouri law does not even recognize a cause of action for spoliation of evidence, *see Brown v. Hamid,* 856 S.W.2d 51, 56-57 (Mo. 1993), — which it surely would have to do if evidence were a protected property interest under Missouri law. *See generally Leis v. Flynt,* 439 U.S. 438, 443 (1979) (Due Process Clause not implicated unless there is "a deprivation . . . of some right previously held under state law"); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11 (1978) ("[t]he availability of local-law remedies [for damages] is evidence of the State's recognition of a protected interest").

Nor has this Court ever recognized a protected interest in the rules of evidence. On the contrary, the Court has held that "statutory rule[s] of evidence ... do not customarily involve constitutional questions." *United States v. Augenblick,* 393 U.S. 348, 352 (1969). In *Augenblick,* the petitioner claimed that his due process rights were violated during his court martial by the denial of discovery of his tape recorded statements, to which he was entitled under the Jenck's Act, 18 U.S.C. § 3500. The Court held that a denial of discovery, even though it violated statutory requirements, could not be "elevated to a constitutional level" and deemed a violation of the Due Process Clause, unless the proceeding as a whole was rendered fundamentally unfair — a standard that this Court has employed in criminal cases. 393 U.S. at 356. *See also Arizona v. Youngblood,* 488 U.S. 51, 58

(1988) (holding that the Due Process Clause is not implicated where state officials in good faith unilaterally discard evidence that might have contributed to the defense); *California v. Trombetta*, 467 U.S. 479, 491-92 (1984) (O'Connor, J., concurring) ("Rules concerning preservation of evidence are generally matters of state, not federal constitutional law"). Although a State's creation of *adjudicatory procedures for redressing a grievance* may give rise to a protected interest, *see Logan* 455 U.S. at 431, this Court has never suggested that *evidentiary rules* create such an interest.[8] *Cf. Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (procedures for adjudicating rights do not in themselves create interests protected by the Due Process Clause: "Process is not an end in itself."). The only time that his Court has imbued evidentiary rules with constitutional significance is in the criminal context, where it is essential to ensure that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *Trombetta*, 467 U.S. at 485.

The consequence of recognizing a property interest in evidence would be that the adequacy of procedures available in litigating every evidentiary motion would become a question of due process. This Court rejected this notion in *Augenblick* in the context of the defendant's argument that he should have been allowed to call the interrogating officer and examine him with respect to the whereabouts of the recorded statement; this Court explained that "questions of

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[8] This Court repeatedly has recognized and given effect to limitations on evidence without making any reference to due process concerns. *See e.g., Hunt v. Blackburn*, 128 U.S. 464 (1888) (attorney client privilege); *Hickman v. Taylor*, 392 U.S. 495 (1947) (attorney work product); *United States v. Reynolds*, 345 U.S. 1 (1953) (state secret privilege). Indeed, where a state secret privilege prevents disclosure and use of evidence, that evidence is disregarded, and the claim or defense will be *dismissed* unless there is sufficient nonprivileged evidence. *See e.g., Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992); *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989).

that character do not rise to a constitutional level." 393 U.S. at 356. A contrary proposition, if accepted, would result in an unwarranted and intrusive federal oversight of state court procedures, not merely for their constitutional adequacy as a whole, but with respect to each evidentiary ruling.

Recognizing a property interest in evidence also would create an expansive new source of liability for state officials. For example, suppose that a state forensics laboratory, while investigating a murder, destroyed relevant and admissible evidence that could determine the identity of the perpetrator. The heirs of the deceased would have been deprived of evidence that otherwise would have been available to support a cause of action against the perpetrator for wrongful death. If the heirs were deemed to have a property interest in that evidence, the State would have committed a due process violation unless it provided the heirs with a post-deprivation remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) ("unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment *if a meaningful postdeprivation remedy for the loss is available*) (emphasis added). This effectively would mandate that the State of Missouri create a spoliation of evidence cause of action against state employees as a matter of federal constitutional law, even though it has specifically declined to recognize such a cause of action against private persons. Such a result would be inconsistent with the principle that state law governs the definition of property.

In sum, Petitioners' purported due process interest in evidence finds no support in Missouri law or in this Court's jurisprudence. Enforcing the terms of the Michigan injunction against Elwell, therefore, does not deprive Petitioners of an interest protected by the Due Process Clause.

C. Even If Petitioners Have A Due Process Interest In Elwell's Testimony, The Procedures Available To Petitioners Satisfy The Requirements Of Due Process

Even if this Court were to hold that Petitioners have a due process right in evidence, there still would be no basis for holding that the full faith and credit obligation to honor Michigan law as to the effect of the Michigan injunction, including the requirement that third parties seeking to modify the injunction do so in the issuing court, would deprive Petitioners of that interest without due process — even assuming that the due process command in this sense qualifies the full faith and credit obligation.

Due process is a flexible concept, the content of which "varies according to specific factual contexts." *Hanna v. Larche*, 363 U.S. 420, 442 (1960). In this case, the full faith and credit obligation that Petitioners seek any modification from the issuing court creates only a slight burden and does not violate the Due Process Clause. *Cf. Logan*, 455 U.S. at 437 (a "reasonable procedural or evidentiary rule" does not violate due process).

At most, application of the full faith and credit principle deprives Petitioners of their ability to obtain and use one witness's testimony. But Anglo-American jurisprudence is rife with limitations on access to and use of evidence that are designed to protect a countervailing public or private interest, including rules of privilege, rules protecting trade secrets, rules barring the use of parol evidence, and rules prohibiting revelation of state secrets. Application of any of these rules may have the practical effect of denying a party access to the only source of evidence by which that party may seek to prove a claim or a defense. Yet, the fact that the parol evidence rule may prevent a person from vindicating his interest in a contract, as modified by oral agreement, does not implicate due process concerns, nor does a rule prohibiting an employee from disclosing a trade secret of his

former employer. Likewise, the state-created laws of privilege that federal courts must enforce pursuant to Federal Rules of Evidence, Rule 501, never have been thought offensive to due process. *See infra* n. 8.

If full faith and credit is accorded to the injunction against Elwell, Petitioners still may resort to procedural remedies provided by Michigan law. As noted above *supra*, section I(A)(2), a third party adversely affected by a Michigan injunction may request that the issuing court modify the injunction, and that court has discretion to do so if "it is no longer equitable that the judgment should have prospective application," Mich. Ct. R. § 2.612(C), or if the court finds *"any other reason justifying relief." Id.* § 2.612(C) (emphasis added). Thus, Michigan law does not make changed circumstances between the parties a precondition to modification of an injunction. In addition, as noted above, an adversely affected third party intervenor may appeal a decision denying the motion to modify. Mich. Ct. R. § 7.203; *Michigan Bank-Midwest*, 165 Mich. App. at 642-43.

On the other hand, allowing the federal district court to determine this issue has no "probable value" in reducing "the risk of erroneous deprivation." *Mathews*, 424 U.S. at 335. The Michigan court is best suited to determine the applicability of its own laws of privilege and the appropriate means of protecting privileged information. It also is as capable as the federal court in reexamining the correctness of the factual premise of the injunction: that GM cannot sufficiently protect its privileged information by lodging specific objections during Elwell's testimony.

Allowing the federal court in Missouri in effect to ignore the Michigan injunction would encroach upon Michigan's legitimate interests in the orderly operation of the procedures that it has set forth for modifying a judgment of its courts, which requires that only the issuing court can modify

an injunction. Mich. Ct. R. § 2.613(B). This requirement embodies a policy choice made by Michigan, which is

> to preserve the dignity and stability of judicial action by preventing unhappy litigants from turning to other trial judges to have the judgment "reversed" and by preventing 'judge shopping.'

Huber, 160 Mich. App. at 573. The rule also reflects Michigan's judgment that, where modification of a judgment or an order is sought, "the original judge is best qualified to rule on the matter." *Id.* The only *Michigan courts* to have addressed whether a litigant should have access to Elwell's testimony without presenting that claim to the issuing court, have adhered to this rule and denied the requests. *See* Respondent's Appendix D & E.

Michigan's interest in "the dignity and stability of judicial action" is jeopardized by inconsistent orders from its own courts, a situation that Michigan appellate courts may review and reconcile. That interest is placed at a much greater peril if courts of other jurisdictions are allowed to "reverse" the issuing court. Given that Michigan has a legitimate interest in preventing "judge shopping," and has declared that Michigan judgments may not be reconsidered in any other court including its own courts, the principles of comity and full faith and credit preclude any claim of a constitutional entitlement to *inter-jurisdictional* forum shopping.

In short, a federal court has no warrant to disregard the procedures established by Michigan in order to decide what is essentially a question of Michigan privilege law. If the Michigan court abused its discretion — as a matter of Michigan privilege law — by adopting the particular form of relief for GM, that would be a matter for the Michigan courts to correct. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941); *Moore v. Sims*, 442 U.S. 415, 429-30 (1979). If the Michigan court correctly

applied Michigan's law of privilege and a constitutional claim is raised, the appellate courts of Michigan should be given an opportunity to correct any error. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-05 (1975) (state courts must be given an opportunity to fulfill their "function of providing a forum competent to vindicate any constitutional objections interposed against [state] policies").

As noted earlier, *Ex parte Uppercu* establishes that the proper course where a third party is adversely affected by a federal court order is to seek relief from that order from the issuing Court — not to challenge it collaterally in another court. Where, as here, the interests of comity and full faith and credit obligation are involved, *a fortiori*, requiring litigants to present their claim of entitlement to the issuing court is consistent with due process.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

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Respectfully submitted,

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